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No. 83-902

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

BOEING VERTOL COMPANY AND
WILLIAM PLATT,

Petitioners

v.

JOHN F. EDWARDS,

Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondent's Brief in Opposition deals primarily with the merits and fails to present grounds why the case should not be reviewed by this Court. That is not surprising; the Court has frequently indicated that questions of *res judicata* and limitation periods in class actions are matters of considerable importance to the judicial system. However, this Reply Brief may be helpful to the Court because respondent Edwards' argument with respect to the first issue presented in the Petition for Certiorari (*res judicata* and collateral estoppel) hinges on misstatements of the record.

The Class Action Court In *Croker v. Boeing* Had Jurisdiction To Make Findings And Conclusions With Respect To Respondent's Testimony Because That Testimony

Was Indisputably Considered In Order To Decide The Class Claims

In the first place, Edwards represents that there is reason to question the jurisdiction of the class action court to make findings and conclusions referring to him. He concedes that he was a member of the certified class in *Croker v. Boeing*, that his individual situation was presented to the class action court as an "illustrative individual situation of discrimination," that the *Croker* court entered specific findings of fact and conclusions of law with regard to that evidence, and that the *Croker* court held that "any inference of discrimination" had been rebutted as to the particular employment decisions he attacks. Edwards nevertheless asserts that the *Croker* court lacked the power to make those findings and conclusions because he was not a named plaintiff or an intervenor[1] and because, he says, "when the *Croker* court denied the class claim of a company-wide pattern or practice of race discrimination, it did not rely on Mr. Edwards' individual facts at all."[2]

In fact, however, there are explicit findings of fact in the present case, which were not appealed, not only that "The *Croker* plaintiffs offered Edwards' testimony in an attempt to prove class claims of discrimination,"[3] but also that "*In reaching its conclusion that the class claim had not been proven, the Court considered the evidence of alleged discrimination against Edwards*,"[4] and even that "[t]he *Croker* court considered evidence of alleged discrimination in the Eccleston and Brighton decisions [i.e., the specific promotion decisions challenged by Edwards] and *weighed the credibility of that evidence in deciding the classwide claims of discrimination*."[5]

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1. Respondent's Brief in Opposition, at 17.
2. *Id.* at 11 and 13.
3. App. to Pet. for Cert., A-16, ¶7.
4. *Id.*, ¶9 (emphasis supplied).
5. *Id.*, ¶7 (emphasis supplied).

The subject of whether or to what extent the *Croker* court had jurisdiction to award relief to Edwards individually is beside the point. There has never been the slightest doubt or dispute that the *Croker* court had jurisdiction to enter findings of fact and conclusions of law on all evidence presented to it *with respect to the class claims*. Edwards has consistently admitted that.[6] And in this case Boeing Vertol relies on exactly those findings and conclusions with respect to Edwards that were entered, according to the unchallenged findings of fact in the present case, "[i]n reaching [the] decision that the class claim had not been proven".

Accordingly, there is no foundation for Edwards' assertion that the *Croker v. Boeing* court lacked the power to make the findings and conclusions which it entered with respect to Edwards' "illustrative individual situation."

Edwards' closely related assertion that the findings and conclusions with respect to him were not allowed appellate review is similarly incorrect. In fact, it is a matter of record that the class plaintiffs attempted to persuade the Court of Appeals in the class action case to set aside the findings and conclusions with respect to Edwards for purposes of the class claims and that none of those findings and conclusions were disturbed.[7]

It Has Never Been Determined That Respondent's Claims Were Atypical Of The Class Claims, And The Third Circuit Erroneously Treated The Question Of Typicality As Immaterial

The remaining premise of Edwards' opposition to a grant on the first issue presented in the Petition for Certiorari is the representation that Edwards' claims are

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6. *E.g.*, Respondent's Brief in Opposition, at 3, 12.
7. *E.g.*, Tr. of CA Oral Arg., at 24; 662 F.2d at 993-95.

atypical of the class claims. Edwards repeatedly conveys to this Court the impression that it is a holding or even an undisputed fact of record that his claims are atypical.[8] That premise is crucial to Edwards' arguments that he should not be bound by the findings, the conclusions, and the judgment in the class action case.

In fact, however, the supposed "atypicality" is nothing but a highly dubious assertion,[9] and Edwards raised it for the first time on appeal in this case.[10] The District Court has never been given a chance to consider whether Edwards' claims is or is not atypical. And that is exactly one reason why this case is so appropriate for certiorari. The Court of Appeals, without even purporting to hold that Edwards had been denied adequate representation by the class representatives, held that *res judicata* and collateral estoppel could not be available to Boeing Vertol.

Boeing Vertol's position on the merits of Issue #1 in this case is that class members in properly certified class actions are bound by the findings and conclusions of the class action court *absent* inadequate notice or inadequate representation. Judging by Edwards' belated emphasis upon assertions of atypicality, he may now concede that the rule suggested by Boeing Vertol is correct. But the problem is that the Third Circuit emphatically

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8. *See, e.g.*, Respondent's Brief in Opposition, at 7-8, 20.

9. Directly contrary to Edwards' representations in this Court (Respondent's Brief in Opposition, at 7), the *Croker* class action court specifically and expressly considered promotions to supervision in Edwards' own Transportation Department. The class representatives presented testimony of several witnesses, including Edwards and one Banks, and other evidence including departmental employment records, on the subject. *E.g.*, 437 F. Supp. at 1176.

10. During the entire period the class action case was pending, Edwards never asserted that his claims were atypical or that he had not been adequately represented by the class representatives. In fact, the class action court made specific findings on typicality when it certified the class in 1972, and that determination became final long before the present case came to trial in 1982.

rejected Boeing Vertol's position and issued a holding on *res judicata* and collateral estoppel which directly conflicts with that of the Fourth Circuit in *Cooper v. Federal Reserve Bank of Richmond*. In part precisely because the Third Circuit treated typicality as immaterial, Issue #1 is especially clear in this case.

In this case but not in *Cooper*, this Court has the opportunity to consider not only the *res judicata* effect of the judgment against the class, but also the collateral estoppel effect of the findings and conclusions entered to reach the judgment. And in this case, unlike *Cooper*,[11] there has never been any claim that the employer waived the defenses of *res judicata* and collateral estoppel. *Cooper* and this case therefore present the classic situation for "straight-lined" consolidation.

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11. See Part II(2) of the Brief for Petitioners on the merits, *Cooper v. Federal Reserve Bank of Richmond*, No. 83-185 (U.S. filed Dec. 12, 1983).

CONCLUSION

The petition for certiorari should be granted and the case should be consolidated for argument in tandem with No. 83-185, *Cooper v. Federal Reserve Bank of Richmond*, or substituted for *Cooper*.

Respectfully submitted,

January 30, 1984

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